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No. 01-360

Supreme Court, U.S.
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In The

# Supreme Court of the United States

SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE, LOUISIANA CHAPTER; ST. JAMES CITIZENS FOR JOBS AND THE ENVIRONMENT; CALCASIEU LEAGUE FOR ENVIRONMENTAL ACTION NOW; HOLY CROSS NEIGHBORHOOD ASSOCIATION; FISHERMEN'S AND CONCERNED CITIZENS' ASSOCIATION OF PLAQUEMINES PARISH; ST. THOMAS RESIDENTS COUNCIL; LOUISIANA ENVIRONMENTAL ACTION NETWORK; LOUISIANA COMMUNITIES UNITED; LOUISIANA ASSOCIATION OF COMMUNITY ORGANIZATIONS FOR REFORM NOW; NORTH BATON ROUGE ENVIRONMENTAL ASSOCIATION; ROBERT KUEHN; CHRISTOPHER GOBERT; ELIZABETH E. TEEL; JANE JOHNSON; WILLIAM P. QUIGLEY; TULANE ENVIRONMENTAL LAW SOCIETY; TULANE UNIVERSITY GRADUATE AND PROFESSIONAL STUDENT ASSOCIATION; INGA HAAGENSON CAUSEY, CAROLYN DELIZIA, AND DANA HANAMAN,

*Petitioners,*

v.

THE SUPREME COURT OF THE STATE OF LOUISIANA,

*Respondent.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit**

## RESPONDENT'S OPPOSITION

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## QUESTION PRESENTED

1. Did the district court properly dismiss the Petitioners' suit for failure to state a claim when:

A. The Louisiana Supreme Court rule about which Petitioners complain contains no restriction on the right of any attorney to solicit and represent public interest *pro bono* clients;

B. The Louisiana Supreme Court rule about which Petitioners complain does not prohibit students from informing individuals or organizations about their legal rights or from acting as law clerks in cases handled by licensed attorneys;

C. The Louisiana Supreme Court rule about which Petitioners complain does not prohibit organizations from informing their members about their legal rights or from referring their members to licensed attorneys;

D. There is no right of non-lawyers to represent third parties in court, and no individual or organization has a right to an attorney in a civil case;

E. The Louisiana Supreme Court rule about which Petitioners complain contains no restriction on the right of any licensed attorney to practice law; and

F. The Louisiana Supreme Court rule about which Petitioners complain contains no restriction on any licensed attorney's representation of any clients.

## PARTIES TO THE PROCEEDING

**Parties Plaintiff:**

Southern Christian Leadership Conference, Louisiana Chapter
St. James Citizens for Jobs and the Environment
Calcasieu League for Environmental Action Now
Holy Cross Neighborhood Association
Fishermen's and Concerned Citizens' Association of Plaquemines Parish
St. Thomas Residents Council
Louisiana Environmental Action Network
Louisiana Association of Community Organizations for Reform Now
North Baton Rouge Environmental Association
Louisiana Communities United
Robert Kuehn
Christopher Gobert
Elizabeth E. Teel
Jane Johnson
William P. Quigley
Tulane Environmental Law Society
Tulane University Graduate and Professional Student Association
Inga Haagenson Causey
Carolyn Delizia
Dana Hanaman

**Parties Plaintiff below Who Did Not Join in this Petition:**

C. Russell H. Shearer

**Amicus:**
**Amicus in the District Court:**

Louisiana Appleseed
Clinical Legal Education Association

## PARTIES TO THE PROCEEDING – continued

**Amicus in the Fifth Circuit:**

Association of American Law Schools
American Association of University Professors
Clinical Legal Education Association
American Civil Liberties Union of Louisiana
League of Women Voters of Louisiana
Louisiana Appleseed
Gloria Roberts
James M. Klebba, Dean of Loyola University School of Law
Edward F. Sherman, Dean of Tulane Law School

**Defendant:**

The Supreme Court of the State of Louisiana

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## STATEMENT OF THE CASE

## PROCEEDINGS BELOW

The Petitioners filed this action in the United States District Court for the Eastern District of Louisiana. There was one additional party who neither joined in the appeal to the United States Fifth Circuit Court nor sought relief in this Petition.[1]

The Louisiana Supreme Court filed a motion to dismiss the complaint for failure to state a claim as to which relief can be granted. After a hearing, with extensive briefing and oral argument, the district court granted the motion to dismiss on July 29, 1999. *Southern Christian Leadership Conference v. Supreme Court of Louisiana* ("*SCLC*"), 61 F.Supp.2d 499 (E.D. La. 1999). (Petition for Writ of Certiorari, Appendix B.)[2]

On May 29, 2001, the United States Fifth Circuit Court of Appeals affirmed the dismissal. *SCLC*, 252 F.3d 781 (5th Cir. 2001), (App. B).

## STATEMENT OF FACTS

The "facts" considered on a motion to dismiss are the allegations in the complaint.[3] While there is a substantial

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[1] C. Russell H. Shearer, a Plaintiff below, did not join in the appeal to the Fifth Circuit. In the Complaint, R. 164, he is listed as a party, but in the Petitioners' Original Fifth Circuit brief he no longer appears as a party.

[2] The Appendix attached to the Petition ("Pet.") will be referred to as "App."

[3] *Kossick v. United Fruit Co.*, 365 U.S. 731, 732 (1961).

dispute as to the accuracy of these allegations, at this point in the case the only thing pertinent is the complaint's allegations and whether they state a claim. The legal issues in the Petitioners' application flow from the following allegations.

The Petitioners are composed of four separate groups; each asserted various causes of actions in the district court. The groups are:

- *Client Organizations,* nine different organizations and one organization composed of twenty separate groups;[4]
- Five *Law Professors* and clinical law instructors from two different Louisiana law schools (Complaint ¶15, App. D, p. 85a);
- Three *Law Students* (Complaint ¶16, App. D, p. 87a); and
- Two *Student Organizations Which Do Not Represent Litigants In Court* (Complaint ¶16(a)-(b), App. D, p. 88a).

Noticeably absent as a party is the Tulane Environmental Law Clinic, the organization that Petitioners alleged was the object of the changes to Rule XX. Also noticeably absent as a party is any law clinic program associated with any of the other law schools in Louisiana.

Each of the groups of Petitioners alleged separate causes of action in the district court. In addition, all

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[4] Louisiana Communities United is described as a "coalition of 20 community, church and union groups in the Mississippi River Parishes of Ascension, Iberville, St. James, East Baton Rouge, and St. Charles." Complaint ¶ 13(j); App. D, p. 85a.

Petitioners made broad-ranging claims that the amendments to Rule XX amounted to "viewpoint discrimination" and discrimination based upon political views (Complaint ¶130, 131; App. D, p. 134a).

The essence of the complaint is that the Tulane Environmental Law Clinic had interpreted the former version of Louisiana Supreme Court Rule XX (governing when law students may appear as counsel in civil cases) as permitting its non-lawyer students to represent organizations of any type in any legal proceeding. The complaint assumes that the Tulane Environmental Law Clinic's reading of the former rule is the correct one and alleges that, in light of that Clinic's success in certain litigation, the Louisiana Supreme Court altered the rule under political pressure.

A number of the Petitioners' claims were abandoned in the appeal to the Fifth Circuit,[5] and in this Petition the claims at issue have been limited further.[6]

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[5] Abandoned in the Fifth Circuit were claims concerning: 42 U.S.C. § 1983 and 1988; claims concerning the right to petition the government for redress of grievances; claims of a denial of equal protection and due process; all claims of vagueness and overbreadth; all claims under the Louisiana State Constitution; and all claims of Plaintiffs C. Russell H. Shearer, Tulane Environmental Law Society and Tulane Graduate and Professional Student Association. An issue not briefed on appeal is considered abandoned. *United States v. Gipson*, 46 F.3d 472, 475 (5th Cir. 1995); *Cinel v. Connick*, 15 F.3d 1338, 1345 (5th Cir.), *cert. denied*, 513 U.S. 868 (1994); *Hobbs v. Blackburn*, 752 F.2d 1079, 1083 (5th Cir.), *cert. denied*, 474 U.S. 838 (1985).

[6] The academic freedom claim appears to be limited solely to the anti-solicitation claim (Petitioners' fifth question presented).

The complaint does not allege that the Louisiana Supreme Court lacks the right to promulgate a rule controlling the actions of non-lawyers who seek to serve in a representative capacity in litigation; rather, it is the Petitioners' position that once a rule is established, it cannot be altered without triggering a constitutional inquiry (Petitioners' Fifth Circuit Brief at p. 26). The Petitioners conceded in the Fifth Circuit (Petitioners' Fifth Circuit Brief at pp. 21, 37) that, without a rule, no student could represent others in litigation.

## ARGUMENT

The petition for a writ of certiorari should be denied because it raises questions not passed upon by either the District Court or the Fifth Circuit Court of Appeals. In addition, the questions presented by the Petitioners do not meet the usual and customary requirements for granting a writ of certiorari, because Petitioners' questions do not present (1) a conflict between United States courts of appeals, or (2) a conflict between a United States court of appeals and a state court of last resort or between two state courts of last resort, or (3) an important question of federal law upon which the Supreme Court should, but has not, ruled.

### I. The facts of the case militate against the granting of the writ.

There are five factors, clear from the record and the Fifth Circuit's opinion, that militate against the granting of the writ.

First, nothing in the Louisiana Supreme Court's Rule XX affects in any way the right of licensed attorneys to represent anyone – individual, association, corporation, or otherwise – in any matter in any court. Rather, the rule solely impacts non-lawyers who seek to represent others before tribunals.[7] Petitioners' contentions that amended Rule XX somehow inhibits community outreach (Pet. pp. 26-27) overlooks the fact that nothing in the rule prohibits any licensed lawyer, whether or not associated with a law school clinic, from representing any person or entity or providing outreach or information.

Second, Petitioners concede that there is no right for non-lawyers to represent others in court,[8] and the law is clear that while individuals may appear *pro se*,[9] corporations, organizations, and business entities may not.[10] Further, it is undisputed that there is no right for Petitioners to either demand or be provided counsel in civil cases.[11]

Third, it is telling that although Petitioners contend that the purported reason for the change in Rule XX was

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[7] The official Louisiana Supreme Court Commentary to Rule XX explicitly states it "places no restrictions on the pro bono representation of solicited clients *by attorneys* employed by or retained by law schools or law clinics." Commentary following Rule XX Section 10, emphasis supplied.

[8] *See* Pet. p. 2; *SCLC*, 61 F.Supp.2d at 506.

[9] 28 U.S.C. § 1654; *Andrews v. Bechtel Power Corp.*, 780 F.2d 124 (1st Cir. 1985), *cert. denied*, 476 U.S. 1172 (1986).

[10] *Pecarsky v. Galaxiworld.com Ltd.*, 249 F.3d 167 (2d Cir. 2001). Louisiana law explicitly states that only lawyers may represent third parties in court. LA. REV. STAT. ANN. § 37:213.

[11] *See* the cases cited and discussed in the district court's opinion, *SCLC*, 61 F.Supp.2d at 506-07.

to affect the Tulane Environmental Law Clinic,[12] the Clinic is not a party to this case.

Fourth, although the Fifth Circuit discussed the standing issue, it engaged in no specific analysis of each set of plaintiffs' claims and merely concluded that "at least some of the Plaintiffs have standing to bring each type of claim."[13] Thus, the particularized requirements of standing for each of the four plaintiff groups have never been specifically addressed and that matter would have to be resolved by this Court, for standing is jurisdictional.[14]

Finally, as the Fifth Circuit noted, the Louisiana Supreme Court has not asserted its Eleventh Amendment Immunity below,[15] but it still has the right to claim this defense.[16]

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[12] *See* Pet. pp. 4-6; *SCLC*, 252 F.3d at 794 (5th Cir. 2001).

[13] *SCLC*, 252 F.3d at 789 (5th Cir. 2001).

[14] Standing requirements are both jurisdictional and not subject to waiver. *Lewis v. Casey*, 518 U.S. 343, 349 n.1 (1996). The issue may be raised on appeal even though lack of standing was not the basis of the dismissal below. *Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 540-41 (1986).

[15] *SCLC*, 252 F.3d at 783 n.2 (5th Cir. 2001).

[16] "The fact that the State appeared and offered defenses on the merits does not foreclose consideration of the Eleventh Amendment issue; 'the Eleventh Amendment defense sufficiently partakes of the nature of a jurisdictional bar' that it may be raised at any point of the proceedings." *Florida Dept. of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 683 n.18 (1982); *Edelman v. Jordan*, 415 U.S. 651, 678 (1974).

## II. The questions presented were not raised in the courts below.

The Petitioners' assertions that the "Court should clarify the circumstances under which courts are to consider viewpoint suppressive motive" (Pet. p. 9) and that the "Court should clarify how the First Amendment unconstitutional conditions doctrine applies" (Pet. p. 19) were not raised in either the district or appellate court. "[O]rdinarily, this Court does not decide questions not raised or resolved in the lower courts." *Taylor v. Freeland & Kronz*, 503 U.S. 638, 646 (1992), quoting with approval from *Youakim v. Miller*, 425 U.S. 231, 231 (1976).

Although the Court in exceptional circumstances may consider issues not raised in the lower courts, this is not an exceptional situation. The case deals not with the broad range of free speech issues but with the narrow question of a court rule regulating non-lawyers who seek to represent others. The petition for a writ of certiorari should be denied because the Petitioners did not raise in the courts below the issues they now ask this court to address.

## III. The petition does not meet the normal criteria for granting a writ of certiorari.

United States Supreme Court Rule 10 provides that the granting of a petition for a writ of certiorari is a matter of judicial discretion and will be exercised only for compelling reasons. Compelling reasons, under the Rule, consist of (1) a conflict between two circuit courts; or (2) a conflict between two state courts of last resort or between

one such court and a United States court of appeal; or (3) an important question of federal law that has not been, "but should be, settled by this Court." None of these criteria are present here.

### A. Petitioners do not identify a conflict between this ruling and any other case.

Petitioners do not identify a single ruling in a single case that conflicts with the Fifth Circuit's ruling. They do not assert that any other case has held that students have a right to represent others in civil proceedings.[17]

#### 1. Alleged differences in this Court's rulings on "motive" analysis under different portions of the First Amendment do not provide a basis to grant a writ of certiorari in this case.

Rather than pointing to any opinions that directly conflict with the Fifth Circuit's ruling below, the Petitioners claim that this Court's holdings "do not yield clear-cut guidance" (Pet. p. 19) and have "given conflicting signals" (Pet. p. 9) about when motive is to be considered in First Amendment cases. To try to create an issue for their writ, the Petitioners expand their specific claims about the purported infringement of the rights of

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[17] Earlier this year, this Court decided *Shaw v. Murphy*, 532 U.S. 223, 121 S.Ct. 1475 (2001). While *Shaw* concerned whether a prisoner had the right to represent another prisoner, and while a prisoner's constitutional rights are more limited than society at large, this Court noted there was "no free standing right" to give or receive legal advice. 121 S.Ct. at 1480 n.3.

teachers to teach through using students as lawyers, the purported rights of organizations to perform "outreach" culminating in court representation by non-lawyers, and the purported infringement of the rights of non-lawyers to solicit clients that the non-lawyers could represent in court, into a generalized First Amendment claim. Once this metamorphosis is complete, Petitioners then compare their generalized claim to ones concerning the Free Exercise Clause (*Church of the Lukumi Babula Aye v. City of Hialeah*, 508 U.S. 520, 533 (1993)), the Establishment Clause (*Sante Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 315 (2000); *Edwards v. Aguillard*, 482 U.S. 578, 585 (1987)), and Freedom of the Press (*Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575, 579-80 (1983); *Grosjean v. American Press Co., Inc.*, 297 U.S. 233, 250 (1936)).

It goes without saying that all First Amendment claims are not subject to either the same analysis or the same jurisprudence. Petitioners admit as much when they state that the "Court has reached different conclusions about the role of motive in its analysis of First Amendment claims depending on the particular circumstances presented" (Pet. p. 14). Of course, each case is decided upon its facts, but that adds nothing to the Petitioners' position. What Petitioners overlook is that an allegation of a violation of a specific clause of the First Amendment is interpreted pursuant to the jurisprudence concerning that clause.

Petitioners' claims against the Louisiana Supreme Court have nothing to do with the establishment clause; therefore, Petitioners' reference to this Court's analysis in *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971), and its

discussion of "purpose"[18] has no relevance to the issues in the instant case. Likewise, whether the Court looked to motive in deciding other establishment clause cases such as *Sante Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 315 (2000), or *Edwards v. Aguillard*, 482 U.S. 578, 585 (1987) is irrelevant here. Neither case concerned viewpoint discrimination nor was decided upon free speech grounds.

The Petitioners' discussion of *Church of the Lukumi Babula Aye v. City of Hialeah*, 508 U.S. 520, 533 (1993), which concerned the free exercise of religion, not free speech,[19] avails them nothing, for the instant case does not deal with religion.

The Petitioners' position is not augmented by their reliance on two cases striking down special taxes on the press: *Minneapolis Star*[20] and *Grosjean*.[21] The instant case has nothing to do with freedom of the press. Morever, *Minneapolis Star* discussed *Grosjean*, pointed out that "our

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[18] "The Court has applied a three-pronged test to determine whether legislation comports with the Establishment Clause. First, the legislature must have adopted the law with a secular purpose. Second, the statute's principal or primary effect must be one that neither advances nor inhibits religion. Third, the statute must not result in an excessive entanglement of government with religion." *Aguillard*, 482 U.S. at 582-83.

[19] It also should be noted that the Petitioners' reliance on *Church of Lukumi Babalu Aye* is undermined by its reference not to the Court's holding but rather to a statement in a concurring opinion. Pet. p. 13.

[20] *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575 (1983).

[21] *Grosjean v. American Press Co., Inc.*, 297 U.S. 233 (1936).

subsequent cases have not been consistent in their reading of *Grosjean*," and held that the issue before it could not be resolved by reliance upon *Grosjean* but rather must be analyzed "anew." 460 U.S. at 580. *Minneapolis Star's* concluding paragraph undermines any claim that motive was the key to its holding: "We need not and do not impugn the motives of the Minnesota legislature in passing the ink and paper tax. Illicit legislative intent is not the *sine qua non* of a violation of the First Amendment." 460 U.S. at 592.

Petitioners' citation of *Board of Education v. Pico*, 457 U.S. 853 (1982) to support their position that "this Court has not articulated a standard for when motive inquiry is appropriate" (Pet. p. 10) has no relevance here. *Pico* concerned the removal of books from a school library – a denial of "the right to receive ideas." 457 U.S. at 867. As the next section of this brief demonstrates, the rule at issue here does not deny access to any idea in any manner.

The jurisprudence is clear; each type of claim under differing clauses of the First Amendment is subject to its own analysis. "It would be error to conclude, however, that the First Amendment mandates strict scrutiny for any speech regulation that applies to one medium (or a subset thereof) but not others." *Turner Broadcasting System, Inc. v. Federal Communications Commission*, 512 U.S. 622, 660 (1994). In this case, involving non-lawyers who seek to represent others in court, Petitioners' attempt to create a generalized conflict in "motive" analysis, a point not raised below, does not create a basis for granting a writ of certiorari.

**2. Rule XX does not prohibit outreach or informational efforts, and Petitioners' reliance on cases involving the rights of licensed lawyers is misplaced.**

Petitioners' reliance on *NAACP v. Button*, 371 U.S. 415 (1963) and *In re Primus*, 436 U.S. 412 (1978) is misplaced. *Button* involved regulation of the practice of law by lawyers. This Court held that the solicitation ban on lawyers and organizations could not be constitutionally applied; the direct harm was to attorneys and those who referred organizations and members to attorneys. *Primus* involved a lawyer who had received a private reprimand for advising an organization's members of their legal rights. Neither case contains the slightest intimation that its holdings relate to non-lawyers who seek to represent others in court.

There is nothing in either *Button* or *Primus* that is inconsistent with Rule XX or the Fifth Circuit's holding. Nothing in Rule XX prevents the client organizations from informing their members about the law. Nothing in Rule XX prohibits any *licensed lawyer* from handling any case before or after an organization or its members have been informed of their rights, whether by the organization or by students. As the Fifth Circuit held, "Rule XX does not prevent the clinics or their members from engaging in outreach, or even from contacting particular clients, advising them of their rights, and offering and then proceeding to represent those clients. The rule only prohibits the non-lawyer student members of the clinics from representing *as attorneys* any party the clinic has so solicited." *SCLC*, 252 F.3d at 789.

There is no "solicitation" or speech issue here that is appropriate for review.

### B. There is no issue of great importance here that would justify granting the writ of certiorari.

Petitioners do not assert that the questions here are of great importance; rather, Petitioners contend that the Court "should clarify the circumstances under which courts must consider viewpoint suppressive motive" and that this Court "has not articulated a standard when motive inquiry is appropriate."

The four groups of Petitioners' ultimate claim here is that their purported "rights" can be vindicated only by allowing non-lawyers to represent others in a court of law. Under their theory, only by permitting students to handle litigation for organizations can the alleged First Amendment issues be resolved, even though the Rule at issue contains no prohibition whatsoever on licensed attorneys handling litigation. Petitioners' issue is not one of great importance, and Petitioners' focus on a single line in the Fifth Circuit's opinion – that the "jurisprudence" is "less than clear" (252 F.3d at 792) – does not create a compelling reason for the Court to grant a writ of certiorari, particularly when there is no circuit split or split between federal and state courts.

## CONCLUSION

The petition for writ of certiorari should be denied because: (1) the issues concerning the clarity of the Supreme Court's jurisprudence were not raised in the lower courts; and (2) because the Petitioners do not meet any of the usual and customary criteria for a writ of certiorari.

Respectfully submitted,

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